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No. 09-901

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CABLEVISION SYSTEMS CORPORATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA; AND
WRNN LICENSE CO., LLC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT WRNN LICENSE CO., LLC

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QUESTION PRESENTED

Whether the Second Circuit correctly held that an order of the Federal Communications Commission restoring a number of Long Island communities to the local television market of broadcast station WRNN for purposes of the must-carry requirement was neither arbitrary and capricious nor contrary to the First Amendment on an as-applied basis.

RULE 29.6 DISCLOSURE

Pursuant to Supreme Court Rule 29.6, WRNN License Co., LLC hereby certifies that it has no corporate parent and no publicly-owned corporation owns 10% or more of its equity stock.

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INTRODUCTION AND SUMMARY

Cablevision's petition purports to mount a radical attack on the "must carry" statute that this Court upheld in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"), and *Turner Broadcasting System, Inc. v FCC*, 520 U.S. 180 (1997) ("*Turner II*"). Although Cablevision raised, and the lower court addressed, only a limited, as-applied challenge to one small portion of the must-carry statute, Cablevision now attempts to expand the scope of this case to include a broad facial challenge to the entire must-carry statute. Even were the Court wont to reexamine the *Turner* rulings, this case—a narrow, fact-specific market modification by the Federal Communications Commission ("FCC")—presents an exceedingly improper vehicle to do so.

As a threshold matter, Cablevision's challenge to must carry is jurisdictionally barred because it failed to follow the exclusive means established by Congress to bring constitutional challenges to the must-carry statute. Section 23 of the 1992 Cable Act provides: "Notwithstanding any other provision of law, any civil action challenging the constitutionality [of the must-carry provisions] . . . shall be heard by a district court of three judges convened pursuant to the provisions of section 2284 of title 28, United States Code." 47 U.S.C. § 555(c)(1). The statute could not be clearer—any constitutional challenge to must carry must be brought before the three-judge panel. This jurisdictional flaw alone justifies denying the petition.

Indeed, the posture of this case could not be more different from the *Turner* cases, nor more unsuited to a facial challenge. *Turner* involved a facial challenge to the entire must-carry statute pursuant to Section 23 of the Cable Act. The market-modification order under review, by contrast, was issued pursuant to a very narrow provision within the Cable Act and arises on petition for review under the Hobbs Act. The FCC's order restoring a handful of Long Island communities to WRNN's local television market turns on the unique facts of this case and is simply not worthy of this Court's attention.

Moreover, the record in this fact-specific case is inadequate to reexamine the *Turner* decisions. Unlike the *Turner* plaintiffs, Cablevision failed to create a plenary record before a three-judge court pursuant to Section 23 of the Cable Act. That is how the *Turner* cases reached this Court and that is why a detailed record on the state of both the cable and broadcast industries was before the *Turner II* Court. There is no such record in this case, because Cablevision is in the wrong forum as a matter of law.

Further, the court of appeals did not even pass upon Cablevision's primary Question Presented—a facial challenge to the must-carry statute as a whole. Even if this question were not jurisdictionally barred, it would not be a sound exercise of the Court's discretion to consider a question not first passed upon by a lower court. Cablevision presents three putative questions for certiorari, including an as-applied challenge and a statutory claim. Not only are these fact-bound questions unworthy of this Court's review, they have the potential to complicate the Court's ability to reach the first

Question Presented. *See Citizens United v. FEC*, 130 S. Ct. 876, 888 (2010) (noting obligation to resolve case on narrowest possible grounds). Cablevision's Questions Presented are exactly backwards to the order in which the Court would be required to address them.

Even if this case presented a proper vehicle, there is no reason for the Court to revisit the *Turner* decisions. In place for almost twenty years, the must-carry statute has become part of the fabric of the law in the television industry just as broadcast television has become a staple for the millions of Americans that still rely on free, over-the-air broadcasting for news and information. Lower courts have followed the *Turner* decisions without question, must carry has proven eminently workable, and hundreds of local broadcasters across the country have relied upon the must-carry statute. *Stare decisis* thus counsels strongly in favor of rejecting Cablevision's broadside against the broadcast industry and its attempt to strand millions of Americans without any source of television news and information.

Nor have developments in the marketplace eroded the need for must carry or altered the three important governmental interests served by must carry. Cablevision focuses myopically on market power, but the *Turner* Court recognized two other important governmental interests. Nothing indicates that must carry is any less essential to preserving over-the-air broadcasting, promoting a multiplicity of information sources, and ensuring fair competition. Indeed, cable's power and incentive to discriminate against broadcast content—and in favor of their own cable content—have remained constant since *Turner*. The record here

suggests that Cablevision wishes to retain its monopoly over Long Island news and information through its ownership of Long Island's only daily newspaper, Newsday, and its own regional news channel, News 12, which directly competes with WRNN for Long Island viewers and advertising dollars. Cablevision has not even attempted to make a record demonstrating lack of market power on Long Island, and, given publicly available facts, such a record would be impossible to make in light of cable's almost ninety-percent share of the multichannel video market in the New York Designated Market Area ("DMA").

At its core, Cablevision's plea—to dispense with must carry altogether in light of alleged changes in the marketplace—appears better suited to a legislative proposal. As Justice Kennedy wrote for the majority in *Turner II*, "[j]udgments about how competing economic interests are to be reconciled in the complex and fast-changing field of television are for Congress to make." 520 U.S. at 224.

Accordingly, the Second Circuit's straightforward application of the statute and *Turner* decisions to the facts of this particular market-modification case is not independently worthy of this Court's review. The FCC's decision is, like the must-carry statute, content neutral and subject to intermediate scrutiny. The court of appeals properly deferred to the Commission's reasoned judgment that restoring the Long Island communities to WRNN's local television market would advance the purposes of must carry. For these reasons, and those given below, the petition should be denied.

STATUTORY PROVISION INVOLVED

The full text of Section 23 of the Cable Act, 47 U.S.C. § 555, is attached hereto as Appendix A.

COUNTER STATEMENT OF THE CASE

WRNN is an independent, family-owned company that operates WRNN-DT, a local broadcast television station licensed in 1985 to Kingston, New York. In addition to entertainment and paid programming, WRNN has historically aired a substantial amount of regional news and public affairs programming targeted to the local communities within its service area. Pet. App. 42a. Much of this programming is of specific interest to residents of Long Island, New York and includes extensive coverage of local sports, news, weather, traffic, and current events. WRNN has received numerous Emmy awards for its originally-produced programming and was recently nominated for five more. WRNN's main competitor on Long Island is Cablevision's own regional cable news station, News 12. In addition to News 12, Cablevision controls Long Island's only daily newspaper, Newsday.

Under the must-carry provisions of the Cable Act, WRNN is presumptively entitled to carriage on Cablevision's cable systems that serve communities in Nassau and Suffolk Counties on Long Island. The must-carry statute requires cable operators, such as Cablevision, to "carry . . . the signals of local commercial television stations" in the same television market as the cable system. 47 U.S.C. § 534(a). Although it creates a presumption of carriage throughout a station's television market, the statute's market-modification

provision empowers the FCC to add or subtract communities from a station's market "to better effectuate the purposes" of must carry. *Id.* § 534(h)(1)(C)(i). When considering market-modification requests, the statute instructs the FCC to "afford particular attention to the value of localism by taking into account such factors as": (1) local service; (2) historical carriage; (3) coverage by other qualified stations; and (4) viewership. *Id.* § 534(h)(1)(C)(ii)(I)-(IV).

Congress enacted must carry to address cable operators' power and incentive to discriminate against broadcast television stations like WRNN. According to Congress, cable operators' "undue market power" and "the economic incentive that cable systems have to delete, reposition, or not carry local broadcast signals" endanger "the economic viability of free local broadcast television and its ability to originate quality local programming." Cable Act § 2(a)(2), 2(a)(16). The incentive comes from the fact that "[c]able television systems and broadcast television stations increasingly compete for television advertising revenues." *Id.* § 2(a)(14); *see also id.* § 2(a)(15). Vertical integration in the cable industry, *i.e.*, common ownership of cable systems and cable programming, gives cable systems an obvious incentive "to favor their affiliated cable programmers." *Id.* § 2(a)(5). Therefore, to ensure the continued viability of free local broadcast television, *id.* § 2(a)(16), cable operators "must carry" the signals of local broadcast stations in their television market.

Despite the presumption of carriage throughout the New York DMA, Cablevision successfully invoked the market-modification provision in 1996 to exclude the

Long Island communities from WRNN's market. The FCC's decision was based in substantial part on the fact that WRNN transmitted its signal from a location far from the Long Island communities. *Cablevision Sys. Corp.*, 11 FCC Rcd 6453 (1996), *aff'd*, *Market Modifications and the New York Area of Dominant Influence*, 12 FCC Rcd 12262 (1997), *aff'd*, *WLNY-TV, Inc. v. FCC*, 163 F.3d 137 (2d Cir. 1998).

Following the 1996 market modification, WRNN corrected the deficiencies identified by the FCC by relocating its transmitter closer to the Long Island communities and commencing digital-only operations. Pet. App. 38a. Each of these changes was subject to prior approval by the FCC and a determination that the modifications furthered the public interest. C.A. App. 23. In addition, WRNN added more local programming and relocated its main studio to Manhattan. Pet. App. 41a. Because WRNN's new transmitter casts a powerful signal over both Kingston and almost all of Nassau County, the station is able to reach a substantially broader audience. *Id.* at 37a, 41a.

In the wake of these changes, multichannel video programming distributors ("MVPDs") in the New York television market, including Cablevision, increased their carriage of WRNN. For example, Cablevision voluntarily entered into an agreement with WRNN to carry the station on its Bronx and Brooklyn systems. C.A. App. 20. Cablevision also carries WRNN on the vast majority of its systems in New York, New Jersey, and Connecticut. *Id.* at 21. Moreover, RCN initiated carriage in Manhattan and Queens, and direct broadcast satellite ("DBS") operators DIRECTV and DISH Network carry

WRNN on Long Island. *Id.* And, since 2006, Verizon has been carrying WRNN on its FiOS systems on Long Island. *Id.* at 724, 740. In fact, WRNN is now carried by every major MVPD on Long Island and its surrounding areas—except for Cablevision in Nassau and Suffolk Counties.

Based on all of these changes, in 2005 WRNN requested restoration of its carriage rights in the cable communities served by Time Warner Cable's ("TWC") systems in New York City that were deleted from WRNN's market as part of the 1996 proceedings. The FCC's Media Bureau granted WRNN's request, *WRNN License Co.*, 20 FCC Rcd 7904 (2005), but not before TWC had voluntarily agreed to carry WRNN and waived any appeal of the Bureau's ruling. TWC concedes that the must-carry statute requires carriage of WRNN based on facts that are virtually identical to this case. TWC Br. 3.

WRNN later asked the FCC to restore to its market the Long Island communities served by Cablevision that were deleted in 1996. Not surprisingly, all of the modifications to WRNN's operations convinced the FCC to restore WRNN's must-carry rights. The FCC's Media Bureau found the strength of WRNN's digital signal, which now covered the Long Island communities, to be decisive. Pet. App. 44a. The Bureau also credited evidence that WRNN is carried by Cablevision and its competitors in adjacent communities. *Id.* at 39a-40a. The full Commission affirmed the Bureau, noting also that WRNN "submitted a substantial record that details programming that focuses on Long Island, particularly communities in Nassau County and communities in

Suffolk County that border Nassau County." *Id.* at 52a. The Commission found carriage to be "in accordance with the Act and Commission precedent," *id.*, and rejected Cablevision's as-applied First and Fifth Amendment challenges, *id.* at 54a-55a.

Cablevision appealed the FCC's order pursuant to the Hobbs Act. 47 U.S.C. § 402(a); 28 U.S.C. §§ 2342, 2344. Finding "no abuse of discretion or constitutional violation," Pet. App. 26a, the Second Circuit unanimously upheld the FCC's decision. The court of appeals found that the FCC had properly analyzed the statutory factors and that carriage of WRNN was consistent with the purposes of must carry. *Id.* at 11a-19a.

The court of appeals also rejected Cablevision's as-applied constitutional challenges to the FCC's order. The Second Circuit found this Court's *Turner* decisions to provide the proper analytical framework. In its *Turner* decisions, this Court rejected the cable industry's First Amendment challenge to the must-carry statute brought pursuant to Section 23 of the Cable Act, and recognized that must carry furthers three important governmental interests. The Court held that the must-carry provisions were content neutral and subject to intermediate scrutiny, *Turner I*, 512 U.S. at 661-62, and were narrowly tailored to advance the government's important interests in "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming," *Turner II*, 520 U.S. at 189 (quotation omitted).

Finding the FCC's order content neutral in light of *Turner I*, the court of appeals had "no trouble" concluding that the order also passed intermediate scrutiny under the First Amendment. Pet. App. 23a. As the Second Circuit found, the "burden imposed by the order—the loss of control over one channel—is no greater than necessary to further the government's interest in preserving a single broadcast channel it found serves the local community." *Id.* at 23a-24a. The court of appeals also rejected Cablevision's Fifth Amendment claim, concluding that "transmission of WRNN's signal does not involve a physical occupation of Cablevision's equipment or property." *Id.* at 25a.

On August 6, 2009, Cablevision sought panel rehearing and rehearing en banc, which were denied without dissent on October 29, 2009. *Id.* at 70a. Cablevision filed a timely petition for a writ of certiorari on January 27, 2010.

REASONS FOR DENYING THE PETITION

I. This Case Is An Improper Vehicle To Reexamine The *Turner* Decisions.

Section 23 of the Cable Act bars Cablevision's attempt to use this case as a vehicle to reexamine the *Turner* decisions. Section 23 of the Cable Act provides that "[n]otwithstanding any other provision of law, any civil action challenging the constitutionality of section 534 or 535 of this title or any provision thereof shall be heard by a district court of three judges convened pursuant to the provisions of section 2284 of Title 28." 47 U.S.C. § 555(c)(1). The statute further permits a

direct appeal to this Court. *Id.* § 555(c)(2). The *Turner* Court considered the constitutionality of the must-carry provisions only after a first look by a three-judge district court. *Turner I*, 512 U.S. at 634-35. Indeed, as that three-judge court found, "[o]riginal jurisdiction of the three-judge court is tied to constitutional challenges to [the must-carry provisions], as is review as a matter of right in the Supreme Court." *Turner Broad. Sys., Inc. v. FCC*, 810 F. Supp. 1308, 1311 (D.D.C. 1992). Cablevision's failure to follow Section 23 warrants denial of the petition.[1]

In any event, this unique case is not a vehicle for the Court to reexamine the "factual underpinnings" of the *Turner* decisions—in particular, the state of competition in the video marketplace. Pet. 1. The FCC restored a handful of Long Island communities in a small slice of New York to WRNN's local television market based on facts unique to this case—the strength of WRNN's digital television signal, carriage by other MVPDs, and the unique geography of the New York television market. Indeed, Cablevision highlights the fact-specific nature of this case in its own Questions

[1] Cablevision notes that it appealed the FCC's order pursuant to the Hobbs Act and invoked the Constitution as a defense. Pet. 6 n.2. But Section 23 of the Cable Act is emphatic in lodging exclusive jurisdiction over all constitutional challenges in the three-judge district court. If Cablevision wished to mount a constitutional challenge to must carry—particularly a facial challenge to the entire statutory scheme—it should have done so in the three-judge court. The "[n]otwithstanding any other provision of law" clause of Section 23 obviously includes the Hobbs Act and the "any civil action" phrase just as obviously includes this case.

Presented when it asks the Court to consider whether it should have to carry WRNN when "the station lacks an over-the-air audience in the area in which the station is seeking carriage, the broadcast station's traditional over-the-air market is well outside that area, the station does not need cable carriage to remain viable, the cable operator has declined carriage for legitimate editorial reasons, [and] the cable operator is subject to unusually robust competition." Pet. i-ii. The FCC's order thus requires a single cable operator, Cablevision, to carry a single broadcast television station, WRNN, on cable systems in a handful of communities on Long Island based on the specific facts of this case. This case is not a proxy for the entire broadcast and cable industries.

This case is unique even within the world of must carry. As noted by the court below, Pet. App. 22a-23a, a prior decision of the Second Circuit excluded Long Island from what is presumptively WRNN's local television market, the New York DMA. Thus, this case is about *restoring* must-carry coverage under a very specific provision of the must-carry statute—the market-modification provision. 47 U.S.C. § 534(h)(1)(C). The narrow issue of the constitutionality of the market-modification provision itself was not addressed in the *Turner* decisions and is not independently worthy of this Court's review.[2]

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[2] Cablevision and its *amici* urge the Court to consider a question left open by *Turner I*: whether a market-modification decision "to grant must-carry privileges upon request to otherwise ineligible broadcast stations" might confer "special benefits on the basis of content." 512 U.S. at 644 n.6 (citing 47 U.S.C. § 534(h)(1)(C)(ii)). This case does not present the (Cont'd)

Moreover, this case lacks the factual record that would be needed to reexamine the *Turner* decisions. In particular, there is no comprehensive, nationwide record regarding the state of competition in the subscription video market as was before the Court in *Turner II*. This Court upheld must carry with the benefit of "unusually detailed statutory findings" regarding the state of competition in the cable and broadcast industries, *Turner I*, 512 U.S. at 646, and finally ruled only after "another 18 months of factual development on remand 'yielding a record of tens of thousands of pages' of evidence, comprised of materials acquired during Congress' three years of preenactment hearings, as well as additional expert submissions, sworn declarations and testimony, and industry documents obtained on remand," *Turner II*, 520 U.S. at 187 (citations omitted). The Court specifically relied upon evidence regarding cable operators' "considerable and growing" market power, *id.* at 197, the structure of the cable industry, *id.*, vertical integration, *id.* at 198, cable systems' incentive to drop local broadcasters, *id.* at 200, the number of broadcast stations actually dropped, *id.* at 202, the importance of advertising revenues, *id.* at 203, the percentage of local broadcasters denied carriage, *id.* at 204, and the importance of carriage to broadcast stations, *id.* at 208.

(Cont'd)
Court with an opportunity to answer that question because WRNN *is* eligible for "must-carry privileges" on Long Island, and the FCC simply restored these communities to WRNN's presumptive market.

Cablevision has not compiled anything close to a comparable record. Instead, Cablevision urges the Court to turn heel on the *Turner* decisions based on a single sentence in *Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009)—a decision that has nothing to do with must carry and was not decided under the First Amendment. There is no record in this case negating cable's market power and incentive to discriminate in general, nor is there any evidence that Cablevision lacks bottleneck monopoly power in the Long Island communities at issue here. *See infra* Part II.B. Further, C-SPAN's claim that millions of homes lost access to its programming in the wake of must carry's enactment, C-SPAN Br. 7, is precisely the kind of unsupported assertion that necessitated a remand in *Turner I*. 512 U.S. at 667-68. Simply put, Cablevision has not compiled the record necessary to consider "transformative market and technological changes" since *Turner*. Pet. 15. It would be impossible to give fair consideration to Cablevision's first Question Presented on the limited administrative record compiled in this fact-specific market-modification case.

Finally, there is no opinion below addressing a facial challenge to the must-carry statute. This Court "do[es] not decide in the first instance issues not decided below," *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999), precisely because deciding an issue "without the benefit of a full record or lower court determinations is not a sensible exercise of this Court's discretion." *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 551 n.3 (1990). Whereas the *Turner* cases considered the facial constitutionality of the must-carry provisions as a whole, Cablevision brought an as-applied challenge to the

FCC's order modifying WRNN's market on Long Island pursuant to the multi-factor test in Section 534(h)(1)(C)(ii). The facial validity of the must-carry statute has never been squarely presented or even at issue in this case. The only First Amendment question passed upon by the Second Circuit and the FCC was whether "compelled carriage of WRNN on Long Island violates the First Amendment on an as-applied basis." Pet. App. 19a (quoting Cablevision Br. at 51). Thus, the issue raised by Cablevision's primary Question Presented was neither pressed nor passed upon below. It would be ill-advised for the Court to consider this question without the benefit of a first look at a substantial factual record by a lower court.[3]

II. The Constitutional Validity Of Must Carry Remains Settled Law.

On the merits, the petition meets none of the criteria of Supreme Court Rule 10 and therefore should be denied. The petition points to no conflict in the circuits about the constitutionality of must carry or the *Turner* decisions. The most Cablevision can do is make the bald assertion that new facts undermine settled law. Pet. 15. As shown below, the assertion itself is in error and thus

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[3] Citing *Citizens United*, Cablevision argues that the as-applied nature of its challenge does not prevent the Court from considering the facial validity of the must-carry statute. Pet. 16 n.4. Unlike in *Citizens United*, where the Court reached a facial challenge after the district court had actually "passed upon" the issue, 130 S. Ct. at 892-93, the Second Circuit in this case never "passed upon" a facial challenge to the must-carry statute because it was never asked to.

the doctrine of *stare decisis* firmly counsels denial of the petition.[4]

A. There Is No Conflict Of Authority.

There is no reason to grant the writ to revisit unquestioned precedent. The constitutional validity of the must-carry provisions has been settled law since this Court rejected the cable industry's First Amendment challenge in its *Turner* decisions. Since then, no court has questioned the validity of the must-carry statute, and lower courts have uniformly upheld compelled carriage in similar contexts. In fact, the Fourth Circuit upheld a form of must carry as applied to DBS. *Satellite Broad. & Commc'ns Ass'n v. FCC*, 275 F.3d 337 (4th Cir. 2001), *cert. denied*, 536 U.S. 922 (2002). The Fourth Circuit reached the conclusion that such a carriage requirement was constitutional as applied to the second player in the market and given market conditions in 2001.

Indeed, a long line of cases has uniformly upheld must-carry orders from the FCC in various contexts similar to that presented here. *See, e.g.*, *WLNY-TV*, 163

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[4] In addition to its First Amendment challenge, Cablevision urges the Court to consider whether must carry constitutes a *per se* taking in violation of the Fifth Amendment. Pet. 23-24. But Cablevision has not framed a question presented asking the Court to take up that issue. In any event, a *per se* taking results in a "permanent physical occupation" of property, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), but the court of appeals found that Cablevision "effectively conceded that this physicality is absent here." Pet. App. 25a.

F.3d at 144-45; *Costa de Oro Television, Inc. v. FCC*, 294 F.3d 123, 129-130 (D.C. Cir. 2002); *see also C-SPAN v. FCC*, 545 F.3d 1051, 1057 (D.C. Cir. 2008) (dismissing cable programmers' appeal of FCC order updating the must-carry rules for lack of standing). Even outside the must-carry context, courts have upheld Cable Act requirements designed to promote competition and limit cable's market power. *Cablevision Sys. Corp. v. FCC*, Nos. 07-1425 & 07-1487, 2010 WL 841203 (D.C. Cir. Mar. 12, 2010) (affirming FCC's extension of Cable Act's prohibition against exclusive contracts between cable operators and affiliated programmers). The Second Circuit's decision applying the *Turner* decisions to the facts of this case is perfectly consistent with this unbroken line of authority.

Where, as here, unquestioned precedent has become the bedrock of entire industries, the Court hews closely to the principle of *stare decisis* to "avoid[ ] the instability and unfairness that accompany disruption of settled legal expectations." *Randall v. Sorrell*, 548 U.S. 230, 243-44 (2006). Overruling the *Turner* decisions would be a disaster for the broadcast industry as well as the millions of Americans that rely exclusively on over-the-air broadcast signals as their sole source of television programming. *Carriage of Digital Television Broadcast Signals*, 22 FCC Rcd 21064 ¶ 54 (2007) ("*Viewability Order*") ("Thus, the viability of local broadcast stations and, consequently, the availability of over-the-air broadcasts for non-cable households depend to a material extent on cable carriage."). During the almost twenty years that must carry has been in force, some forty percent of all broadcast stations have come to rely upon this statute, and the entire cable industry has

adjusted to this regulatory reality. If the *Turner* decisions were suddenly reversed, broadcast stations currently carried by cable systems pursuant to must carry would be dropped and forced to negotiate carriage on cable systems with staggering market power relative to local broadcasters. Cablevision thus bears an extremely heavy burden to overcome the presumption in favor of adhering to the *Turner* decisions. *Randall*, 548 U.S. at 244 ("Departure from precedent is exceptional, and requires special justification." (internal quotation marks omitted)). Respect for this Court's precedent and consideration of the enormous reliance interests spawned by the *Turner* decisions strongly counsel against certiorari in this case.

B. Must Carry Remains Necessary To Address Cable's Power And Incentive To Discriminate Against Broadcasters.

The central premise of Cablevision's petition is that the marketplace has changed since 1997 such that must carry has become unnecessary. Pet. 15. Not only does Cablevision offer scant record evidence to support its claim, publicly available facts and FCC decisions since this Court's decision in *Turner II* prove that it is untrue. The justification for must carry is at least as strong today as it was in 1997.[5]

[5] Cablevision incorrectly attempts to place the burden on the government to show that must carry remains valid. Pet. 17-18. A governmental entity need not reinvent the wheel in each particular case to demonstrate the existence of an important (Cont'd)

First, the benefits of digital television amplify the importance of preserving free, over-the-air broadcast television, which Congress and this Court have recognized as a governmental interest of the highest order. *Turner I*, 512 U.S. at 662-63. The death of broadcast television—furthered by viewers' steady migration from broadcast to cable and satellite television—would deliver a devastating blow to the public interest; it would leave some fifteen million over-the-air television households throughout the country without a free source of video news and information.[6] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 FCC Rcd 542 ¶ 16 (2009) ("*Thirteenth Annual Report*"). By and large, these fifteen million television households (or approximately forty-five million Americans) occupy the lower socioeconomic brackets of our society and cannot afford to pay for cable. Providing all Americans with free access to news, information, and opinion is central to the functioning of our democracy. No one should be excluded from the marketplace of ideas.

(Cont'd)
government interest. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 297 (2000) (citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986)). The FCC properly relied upon the evidence before the *Turner* Court that must carry is justified by cable operators' power and incentive to discriminate against broadcasters. It is Cablevision's burden to show a "special justification" to disregard that finding. *Randall*, 548 U.S. at 244.

[6] Cablevision and TWC describe the fifteen million households still relying on over-the-air television as an insignificant number, Pet. 19-20, TWC Br. 17, yet this number is larger than TWC's entire customer base and five times that of Cablevision's.

Second, must carry remains necessary to stop cable operators from discriminating against broadcasters. Congress recognized that cable operators have the power and economic incentive to discriminate against local broadcast stations, like WRNN, that directly compete for advertising revenue. Cable Act § 2(a)(5), (14)-(16); *Turner I*, 512 U.S. at 633. Vertical integration motivates cable to discriminate against broadcasters in favor of programming in which they have an equity stake. *Id.* at 646. Importantly, the evidence before Congress showed that the threats to local broadcasters would only increase in the future. *Turner II*, 520 U.S. at 203-04, 212. Market developments demonstrate that Congress' concerns are as valid today as they were in 1992. *Thirteenth Annual Report* ¶ 183; *see also Cablevision Sys. Corp.*, 2010 WL 841203, at *1, *7.

The incentive for cable to prefer affiliated programmers has grown even greater over time. The FCC recently adopted new program access rules because cable operators—Cablevision in particular—have "unfairly" withheld affiliated programming from competing MVPDs in a manner that "significantly hinder[s]" competition in the video marketplace. *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, No. 07-198, ¶¶ 25-32 (rel. Jan. 20, 2010) ("*2010 Program Access Order*"). Moreover, in this very case, Cablevision operates its own regional news station, News 12, which directly competes on Long Island with WRNN's local news and public affairs programming. Combined with the inherent incentive to discriminate against local broadcasters, Cablevision's operation of News 12, as well as its control of the only Long Island daily

newspaper, Newsday, provides additional incentive to deny carriage for anticompetitive purposes.

Third, must carry was intended not just to protect broadcasters from anticompetitive behavior, but also to preserve a "multiplicity of broadcast outlets regardless of whether the conduct that threatens it is motivated by anticompetitive animus." *Turner II*, 520 U.S. at 194. Here, carriage of WRNN ensures that Long Island residents are not held hostage by Cablevision's monopoly power over information on Long Island through its ownership of both News 12 and Newsday. Must carry thus insures that Long Island viewers have access to an information source other than those owned by Cablevision. Considering the increased vertical integration in the cable industry since 1992, cable's market power and financial incentive to discriminate remain a threat to broadcasters that provide the local programming Congress intended to preserve.

Cablevision argues that the justification for must carry has evaporated because cable operators no longer have "bottleneck" power.[7] Pet. 18. The only evidence Cablevision can muster in support of this argument is a single sentence of dictum from an opinion issued after the Second Circuit ruled in this case. Cablevision makes

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[7] Cablevision takes a cramped view of "*Turner*'s rationale," Pet. 1, describing it as resting upon "an intricate chain of reasoning," Pet. 4, as if it were a fragile one-legged stool. In fact, *Turner II* found that three separate important governmental interests were furthered by the must-carry provisions. Cablevision focuses solely on "bottleneck" power, but cannot argue that the important governmental interest in a multiplicity of voices is not furthered by must carry.

no attempt to argue that the D.C. Circuit's *Comcast* decision conflicts with the Second Circuit's decision in this case, nor could it. The actual holding of the *Comcast* court was a run-of-the-mill administrative law determination that the FCC had failed to consider a salient factor in its analysis of the cable subscriber limit provision in the Cable Act, 47 U.S.C. § 533(f). Indeed, the D.C. Circuit had directed the FCC "*to consider* the competitive impact of DBS companies" in a prior ruling. *Comcast*, 579 F.3d at 7 (emphasis added).

In any event, Cablevision is wrong; cable operators still have the same market power and incentive to discriminate against broadcasters as they did when *Turner II* was decided.[8] The FCC recently concluded, in the context of updating its must-carry rules for the transition to digital television, that cable operators' market power still represents a threat to free, over-the-air broadcasting. "Although it faces competition by DBS operators and others, the cable industry by far remains the dominant player in the market, commanding approximately 69 percent of all MVPD households." *Viewability Order* ¶ 49. "By contrast, the percentage of households that rely on over-the-air broadcast signals has declined significantly since the *Turner* decisions," marking a "shift in the competitive balance between

[8] Cablevision relies heavily upon Justice Breyer's concurring opinion in *Turner II*, Pet. 18-19, yet ignores the fact that he would have upheld must carry regardless of cable's bottleneck monopoly power. According to Justice Breyer, "assur[ing] the over-the-air public access to a multiplicity of information sources . . . provides sufficient basis for rejecting appellants' First Amendment claim." *Turner II*, 520 U.S. at 226 (Breyer, J., concurring) (internal quotation marks omitted).

broadcast and cable." *Id.* "In addition, cable operators continue to exercise control over most (if not all) of the television programming that is channeled into the subscriber's home [and] can thus silence the voice of competing speakers with a mere flick of the switch." *Id.* ¶ 50 (internal quotation marks omitted).

The growth of satellite providers has not come at cable's expense, but at the expense of over-the-air broadcasting. While cable's market position has remained constant since *Turner*, *compare* Cable Act § 2(a)(3) *with Thirteenth Annual Report* ¶ 10, satellite providers have increased their market share as the number of households relying on over-the-air services has declined, *compare id.* ¶ 12 *with id.* ¶ 16. The emergence of satellite as an alternative to cable has only increased the threat to broadcasters.

Congress recognized the growing threat posed by satellite providers when it enacted the Satellite Home Viewer Improvement Act ("SHVIA") in 1999 to "preserve free television for those not served by satellite or cable systems and to promote widespread dissemination of information from a multiplicity of sources." H.R. Conf. Rep. No. 106-464, at 101 (1999). Akin to the must-carry provisions of the Cable Act, SHVIA contains a "carry one, carry all" provision requiring satellite providers to carry all broadcast television signals in markets where they provide local service, 47 U.S.C. § 338, which, as mentioned above, has been upheld against a constitutional attack similar to the one brought by Cablevision here. *Satellite Broad. & Commc'ns Ass'n v. FCC*, 275 F.3d 337 (4th Cir. 2001). This Court denied certiorari in that case. 536 U.S. 922 (2002).

In light of current market conditions, the D.C. Circuit recently rejected the very argument Cablevision makes here. The court ruled that changes in the video marketplace did not undermine its earlier decision upholding the Cable Act's exclusivity prohibition against a facial First Amendment challenge.[9] *Cablevision Sys. Corp.*, 2010 WL 841203, at *4-5. While "[i]t is true that the MVPD market has transformed substantially since the Cable Act was enacted in 1992," the court concluded, "the transformation presents a mixed picture." *Id.* at *7. "[C]able still controls two thirds of the market nationally," but "[i]n designated market areas in which a single cable company controls a clustered region, market penetration of competitive MVPDs is even lower than nationwide rates." *Id.* The court noted that in many DMAs "consumers continue overwhelmingly to subscribe to cable. Because of this clustering and consolidation, a single geographic area can be highly susceptible to near-monopoly control by a cable company." *Id.* at *2.

Indeed, the FCC specifically found that cable's share of the MVPD market in the New York DMA exceeded eighty percent in July 2007. *Implementation of the*

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[9] Judge Kavanaugh dissented, arguing that the FCC's exclusivity ban—which Congress intended to "sunset" within ten years of the 1992 Cable Act barring extension by the FCC—was no longer necessary to further competition. However, Judge Kavanaugh relied upon the *Turner* decisions no less than thirteen times and specifically cited *Turner I* to support his view that "[w]hen a speech market is not competitive, content-neutral government intervention may sometimes be permissible." *Cablevision Sys. Corp.*, 2010 WL 841203, at *20 (Kavanaugh, J., dissenting).

Cable Television Consumer Protection and Competition Act of 1992, 22 FCC Rcd 17791 ¶ 52 n.277 (2007) (citing Nielsen Media Research data). More recent data show that cable's share of the New York MVPD market has now grown to nearly ninety percent.[10] Simply put, cable still has the market power and the incentive to refuse to carry the signals of local broadcast television stations—like WRNN.[11]

In addition to competition, Cablevision points to a number of other purported changes in the marketplace in its attempt to undermine must carry. Pet. 19-21. None make a dent in this Court's conclusions in *Turner II*.

First, the *Turner II* Court rejected A/B switches as an alternative to must carry "based on substantial evidence of technical shortcomings and lack of consumer acceptance." 520 U.S. at 221. The same is true today, as the FCC recently found. *Viewability Order* ¶ 53 ("[S]witching signal sources still remains cumbersome or impossible for television viewers and does not represent an adequate alternative to must-carry regulation.").

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[10] DMA Household Universe Estimates February 2010: Cable And/Or ADS (Alternate Delivery Systems), http://www.tvb.org/nav/build_frameset.asp (follow "Research Central" hyperlink; then follow "Market Track" hyperlink; then follow "Cable and ADS Penetration by DMA" hyperlink) (last visited Mar. 24, 2010).

[11] The Cable Act allows broadcasters to elect retransmission consent, rather than must carry, and negotiate carriage with cable operators. 47 U.S.C. § 325(b). This ensures that must carry is only invoked by broadcasters like WRNN that need must carry to gain carriage in markets where cable has the power and incentive to discriminate. *See Turner II*, 520 U.S. at 217.

Second, the fact that some fifteen million American television households (or approximately forty-five million Americans) still rely on over-the-air television broadcasting only illustrates the importance of the governmental interest at stake. Congress intended to preserve a multiplicity of broadcast stations for the underprivileged and underserved Americans that still rely on over-the-air broadcasting and do not subscribe to cable or another MVPD. *Turner II*, 520 U.S. at 194. While cable still commands a large share of the market, the percentage of households that rely on over-the-air broadcast signals has declined. This "shift in the competitive balance between broadcast and cable" has further weakened broadcast stations and represents a threat to the survival of free, over-the-air broadcasting that led Congress to enact must carry. *Viewability Order* ¶ 49. In other words, the underlying problem addressed by the must-carry statute has only grown worse—local broadcast television is in a more precarious state than it was in 1997.

Third, technological advances have substantially mitigated the burden imposed by must carry. The *Turner I* Court recognized that, "given the rapid advances in fiber optics and digital compression technology, soon there may be no practical limitation on the number of speakers who may use the cable medium." 512 U.S. at 639. The *Turner II* Court later found that "the evidence adduced on remand indicates the actual effects [of must carry] are modest." 520 U.S. at 214. The FCC now predicts "that cable capacity will continue to expand in future years, thus further decreasing the relative burden on cable operators." *Viewability Order* ¶ 60. Cable operators like Cablevision now have "the

means of adding channels and never running out of capacity" because they have migrated most of their customers from analog to digital cable. *Id.* Because Cablevision's digital-cable systems "offer so much more capacity, the proportion of overall bandwidth devoted to must-carry signals is that much smaller than was the case at the time of the *Turner* decisions." *Id.*; TWC Br. 20-21 (noting "the increased channel capacity on TWC's systems as compared to 15 years ago").[12]

In fact, Cablevision's actions in this case belie any notion that carriage of WRNN would be burdensome or contrary to neutrally-exercised "editorial discretion." Pet. 10. Cablevision laments that it will have to replace C-SPAN with WRNN on some systems, Pet. 25, but Cablevision moved C-SPAN onto Channel 48 *after* the FCC issued an order that requires carriage of WRNN on that same channel. Moreover, Cablevision recently initiated carriage of another Kingston-area television station that broadcasts from the same transmitter site as WRNN,[13] even though the FCC excused Cablevision from carrying WTBY in the same 1996 proceeding in which the FCC initially modified WRNN's market. *Cablevision Sys. Corp.* ¶¶ 61-64.

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[12] In contrast with the exponential increase in cable capacity, the number of broadcast stations eligible for must carry has remained essentially static since *Turner II*. *Thirteenth Annual Report* ¶ 106 & n.358. Thus, if a "large majority" of broadcasters have indeed elected retransmission consent over must carry, TWC Br. 20, then the burden of must carry has even further decreased over time.

[13] Mike Reynolds, *TBN Completes New York DMA Distribution Via Cablevision Rollout*, Multichannel News (Aug. 25, 2009).

III. The Second Circuit's Decision Is Consistent With *Turner* And The Must-Carry Statute.

In light of the validity of must carry, the Second Circuit's straightforward application of the *Turner* decisions and must-carry statute to the facts of this particular market-modification case is not worthy of this Court's review. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). As explained below, the Second Circuit's decision does not conflict with the *Turner* decisions or the must-carry statute.

A. The Second Circuit Correctly Applied The *Turner* Decisions To This Case.

The Second Circuit unanimously rejected Cablevision's First Amendment challenge by applying the principles recognized in the *Turner* decisions to the facts of this market-modification case.[14] Far from "expanding [must carry's] application to new contexts," Pet. 2, the Second Circuit's decision falls within the heartland of the *Turner* decisions. *Turner II* upheld must carry in a station's local television market—the exact decision rendered by the FCC in this case when it restored the Long Island communities to WRNN's local television market.

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[14] Cablevision mischaracterizes the Second Circuit's decision when it argues that the court found Cablevision's as-applied challenge barred by the *Turner* decisions. Pet. 22-23. In fact, the court of appeals recognized "that the *Turner* cases do not foreclose the possibility of a successful as-applied First Amendment challenge," but concluded that "Cablevision has failed to demonstrate that the FCC applied the market modification provision unconstitutionally." Pet. App. 19a.

Cablevision argues, however, that the Second Circuit should have applied strict, rather than intermediate, scrutiny because the FCC relied upon the content of WRNN's programming. Pet. 30. The Second Circuit correctly rejected this argument. In *Turner I*, this Court held that the must-carry provisions are content neutral, 512 U.S. at 643-44, and rejected the argument "that the must-carry regulations are content based because Congress' purpose in enacting them was to promote speech of a favored content," *id.* at 646. Applying *Turner I*, the Second Circuit correctly found that the FCC's consideration of the market-modification factors was also content neutral. Pet. App. 22a. This Court's holding in *Turner I* that the promotion of localism and local broadcast television is not content based, 512 U.S. at 644-45, was properly followed by the Second Circuit.

The Second Circuit did not rule that "consideration of content triggers strict scrutiny only when there is an 'illicit content-based motive.'" Pet. 30. To the contrary, the court of appeals simply noted that Cablevision failed to prove "that restoration of the Long Island communities to WRNN's market under these circumstances was based on some illicit content-based motive." Pet. App. 23a. As *Turner I* recognizes, some speaker-based discrimination is permissible to further a non-content-based governmental interest. 512 U.S. at 660-61. That is all the Second Circuit recognized here.

Nor did the court of appeals create a "*de minimis* exception[ ] in the First Amendment area." Pet. 31. The Second Circuit stated that "WRNN's local programming was an inconsequential factor in the FCC's ultimate decision," Pet. App. 23a, because the strength of

WRNN's signal—not the content of WRNN's programming—was the crucial factor in restoring the Long Island communities to WRNN's presumptive market. *Id.* at 44a. This is borne out by the fact that the Media Bureau ordered carriage without a favorable finding regarding WRNN's local programming. *Id.* at 43a-44a. In any event, it is the avowed purpose of must carry to further localism and local broadcasting. It cannot suddenly be rendered unconstitutional because it accomplishes that goal in particular cases.

Cablevision makes a number of arguments in an attempt to show that *Turner* cannot be applied to specifically require carriage of WRNN on Long Island. Pet. 25-29. In addition to being completely unworthy of this Court's review, none are convincing.

First, Cablevision contends that carriage of WRNN cannot be justified because of WRNN's low viewership. Pet. 25-26. However, WRNN's low viewership levels are attributed to the fact that it returned its analog spectrum—with the FCC's approval—well in advance of the digital television transition. *WRNN-TV Assocs.*, 19 FCC Rcd 12343 (2004). WRNN is now a digital-only station broadcasting from a different facility that provides better coverage of the New York market than its former analog station. In any event, the *Turner II* Court rejected the argument that must carry could not be justified because of some broadcasters' low viewership levels, noting that the broadcast stations that stood to gain from the must-carry statute were those just like WRNN. 520 U.S. at 205-06. The Court understood that broadcasters denied cable carriage will typically have lower viewership levels than affiliated cable programmers. *Id.* at 206.

Second, the court of appeals correctly rejected Cablevision's argument that must carry was not intended to make broadcasters "better off" than they would have been in a world without cable. Pet. 26-27. This argument, the Second Circuit found, "rests on a conception of the statute's purpose that is overly narrow, unsupported by precedent, and contrary to the language of the statute." Pet. App. 17a. The purpose of the must-carry statute "is not to 'preserve' a group of broadcast stations, or a particular conception of a station's market, but, *inter alia*, to 'preserv[e] the benefits of free, over-the-air television,' and 'promot[e] the widespread dissemination of information from a multiplicity of sources.'" *Id.* at 19a (quoting *Turner I*, 512 U.S. at 662). Must carry is not served "only by granting broadcasters the minimum must-carry coverage necessary for survival." *Id.* Nor is the statute "frustrated by actions which result in a station's greater prosperity." *Id.*

Third, Cablevision's argument that the FCC was required to show that WRNN "will decline absent carriage" is a nonstarter. Pet. 27. A similar argument was rejected by the *Turner II* Court. 520 U.S. at 216 (rejecting argument that the "must-carry provisions are overbroad because they require carriage in some instances when the Government's interests are not implicated," such as where the broadcaster would survive without cable access). Neither the must-carry statute nor the *Turner* decisions require evidence that "hardship will befall the particular station at issue" in order for the FCC to modify a station's television market. Pet. 27.

Fourth, this case is the poster child for anticompetitive animus and the latest salvo in Cablevision's campaign to stifle competition in the New York market.[15] Although Cablevision trumpets its "editorial discretion" in declining to carry WRNN, Pet. 21, it is impossible to ignore Cablevision's real motive.[16] In this very case, Cablevision seeks to guard its monopoly over local news on Long Island through its ownership of News 12 and Newsday. Indeed, Cablevision's choice to carry WTBY highlights its anticompetitive animus because WTBY's religious

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[15] *Yankees Entm't & Sports Network, LLC v. Cablevision Sys. Corp.*, 224 F. Supp. 2d 657, 672 (S.D.N.Y. 2002) ("Plaintiff has adequately alleged that Cablevision's monopoly in the regional sports programming market has been leveraged in the secondary markets of broadcast rights and advertising and caused price distortions consistent with a tangible harm to competition" (internal quotation marks omitted)); *2010 Program Access Order* ¶ 30 ("Cablevision has withheld the terrestrially delivered HD feeds of its affiliated MSG and MSG+ RSNs from certain competitors in New York City, Buffalo, and Connecticut.").

[16] Cablevision's and TWC's repeated characterizations of WRNN as a "home-shopping" station are both inaccurate and hypocritical. Like many stations, WRNN offers national paid and entertainment programming to support its acclaimed local news and public affairs programming. For example, WRNN recently received five Emmy nominations for programs such as "Focus on Veterans" and "Public Defenders/Drug Court." By contrast, both Cablevision and TWC carry three full-time "home-shopping" stations—ShopNBC, HSN, and QVC—on their basic tiers, all of which, unlike WRNN, offer no local programming. Cablevision and TWC apparently believe paid programming is beneficial except when it is carried by a competing broadcast station.

programming does not compete with Cablevision's News 12, but WRNN does. Cablevision has therefore done everything in its power for almost four years to keep WRNN off of its Long Island cable systems. In any event, the *Turner II* Court rejected the notion that the "must-carry provisions are overbroad because they require carriage in some instances" where the cable system operator has no specific anticompetitive motive. 520 U.S. at 216.

Last, Cablevision attempts to show it is subject to competition on Long Island by pointing to satellite operators' national growth and Verizon's recent initiation of its FiOS service on Long Island. Pet. 28. But Cablevision points to no evidence that satellite operators have cut into its specific market share on Long Island. Nor could it, because cable dominates nearly ninety percent of the New York MVPD market. *See supra* Part II.B. Moreover, the evidence before the Commission was that Verizon had barely even begun servicing Long Island—hardly sufficient time to make a noticeable dent in Cablevision's market share on Long Island. Pet. App. 39a, 62a. Indeed, in 2006 Verizon served little more than two percent of all television households. *Thirteenth Annual Report* ¶ 132.

B. The Second Circuit Properly Deferred To The Commission's Application Of The Must-Carry Statute.

Again, the issue of whether the FCC properly applied the market-modification provision in this case is simply not worthy of this Court's review. Even were it

so, the Second Circuit properly deferred to the Commission's reasoned judgment that carriage of WRNN is consistent with must carry. The Commission's interpretation and application of the must-carry statute is reviewed under the highly deferential standard set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Contrary to Cablevision's unsupported assertion, Pet. 34, the FCC *did* consider whether carriage of WRNN is consistent with must carry. Pet. App. 52a. So did the court of appeals. *Id.* at 19a. In this case, carriage of WRNN promotes localism and furthers the important objectives of must carry by ensuring that (1) WRNN remains economically viable in order to serve viewers throughout the New York DMA who rely on free, over-the-air television service; (2) Long Island residents have access to an information source in addition to those owned by Cablevision—News 12 and Newsday; and (3) WRNN is able to compete fairly with Cablevision's own News 12 for advertising revenues.

Cablevision argues that the FCC's order does not promote localism because it incents WRNN to neglect Kingston and cater to Long Island. Pet. 32-33. The Second Circuit recognized that this argument "rests on the false premise that WRNN's programming consists entirely of either Kingston-specific programming or Long Island-specific programming." Pet. App. 17a. Again, Cablevision "incorrectly presumes that WRNN cannot increase Long Island-targeted programming

without decreasing Kingston-targeted programming." *Id.*[17]

The Second Circuit also rejected Cablevision's argument that the FCC rewarded gamesmanship because WRNN is after "must-carry riches." Pet. 27. The court of appeals found this argument runs "counter to a central premise of the regulatory scheme that a regulated entity will change its conduct in socially desirable ways to achieve a regulatory benefit." Pet. App. 18a. In this case, WRNN adhered to the must-carry statute by correcting the deficiencies found by the FCC and Second Circuit (at Cablevision's urging) in 1996 to justify deletion of the Long Island communities from its presumptive market.

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[17] Cablevision's reliance upon the concept of a "traditional over-the-air service area" is a fiction created to restrict artificially the reach of must carry and confine stations like WRNN to small parts of the DMA. Pet. 33. As the Second Circuit recognized, WRNN is statutorily entitled to a presumption of carriage throughout the entire New York DMA, which includes Cablevision's cable systems on Long Island. The FCC was undoubtedly correct to restore carriage in light of that presumption.

CONCLUSION

For the reasons set forth above, the petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — RELEVANT STATUTE

47 U.S.C. § 555

(a) Actions to review determinations by franchising authorities

Any cable operator adversely affected by any final determination made by a franchising authority under section 541(a)(1), 545 or 546 of this title may commence an action within 120 days after receiving notice of such determination, which may be brought in—

(1) the district court of the United States for any judicial district in which the cable system is located; or

(2) in any State court of general jurisdiction having jurisdiction over the parties.

(b) Available relief

The court may award any appropriate relief consistent with the provisions of the relevant section described in subsection (a) of this section and with the provisions of subsection (a) of this section.

(c) Review of constitutionality of sections 534 and 535

(1) Notwithstanding any other provision of law, any civil action challenging the constitutionality of section 534 or 535 of this title or any provision thereof shall be heard by a district court of three judges convened pursuant to the provisions of section 2284 of Title 28.

(2) Notwithstanding any other provision of law, an interlocutory or final judgment, decree, or order of the court of three judges in an action under paragraph (1) holding section 534 or 535 of this title or any provision thereof unconstitutional shall be reviewable as a matter of right by direct appeal to the Supreme Court. Any such appeal shall be filed not more than 20 days after entry of such judgment, decree, or order.